

Service Date: June 4, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of)	UTILITY DIVISION
MOUNTAIN WATER COMPANY for)	
Authority to Increase Rates and Charges)	DOCKET NO. D98.5.104
for Water Service to its Missoula Division)	ORDER NO. 6069a

PROTECTIVE ORDER

BACKGROUND

On May 29, 1998, the Montana Public Service Commission (PSC or Commission) received a Motion for Protective Order from the Mountain Water Company (Mountain Water), seeking to limit access and use of proprietary and confidential information which is either closely held by Mountain Water as confidential business information, or in which its employees have a right of privacy. Mountain Water anticipates that data requests may be submitted in this Docket which request the disclosure of this confidential information.

Mountain Water maintains that this information is "trade secret," pursuant to §§ 69-3-105(2) and 30-14-402(4), MCA, in that this information related to a utility employee's right of privacy is protected under Section 10 of Article II of the Montana Constitution. To support this position, Mountain Water cites *State v. Burns*, 253 Mont. 37, 830 P.2d 1318 (1992) and *Montana Human Rights Division v. Billings*, 199 Mont. 434, 649 P.2d 1283 (1982).

For expedience, the Commission grants the request for the Protective Order and issues it as sufficiently broad to protect information deemed to be proprietary by Mountain Water in this Docket, without further amendments or requests, subject to any challenges to the confidentiality pursuant to this Order. The protection of this Order is limited to confidential information provided by Mountain Water only. In issuing this Order, the Commission is not making any determination as to whether the protected information is trade secret under Montana law or whether the employees have a constitutionally protected right of privacy.

ORDER

IT IS ORDERED that this Protective Order, covering the material and information described by Mountain Water in its Motion, and material and information filed by Mountain Water throughout the proceedings in Docket No. D95.9.128, determined by Mountain Water to be confidential, shall be in effect, unless there is a Commission or Mountain Water decision that the information need not remain protected, as provided in this Order.

1. Confidential Information. All documents, data, information, studies and other materials furnished pursuant to any interrogatories, requests for information, other discovery requests, or subpoenas and depositions, or pursuant to Commission order, that are claimed to be trade secret, privileged or confidential shall be furnished pursuant to the terms of this Order. All persons accorded access under this Order shall treat this trade secret, confidential or privileged commercial and financial information as confidential (referred to as "Confidential Information"). Confidential Information shall not be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order. All material claimed to be Confidential Information must be marked with a designation indicating its trade secret, proprietary or confidential nature, and submitted to the Commission on yellow paper for identification for filing purposes.

2. Terms of Disclosure. Confidential Information submitted pursuant to this Order shall be given solely to counsel for the parties, the Commission and the Commission Staff, and shall not be used or disclosed except for purposes of this proceeding, or as otherwise permitted by subsequent Commission order. Counsel may authorize access to any specific Confidential Information solely for the purpose of this proceeding to designated experts. A designated expert may be an employee of a party, provided that the employee's duties are solely dedicated to regulatory activities on behalf of the party. Any member of the Public Service Commission and Staff, the Consumer Counsel and its staff and staff members of intervenor State agencies may have access to any Confidential Information provided under this Order, and shall be bound by the terms of this Order.

(a) Five (5) days written notice (counted from the date of receipt by the providing party) shall be given to the party that produced the Confidential Information. The notice shall

contain the name, title, job description, description of previous positions and experience, and area of expertise of any person to be given access to such information.

(b) If it is the good faith position of the party that produced the Confidential Information that the designated person should not be given access to the information, that party must respond to the notice with a written objection.

(c) If the party requesting access for a designated person does not receive written objection by the party that produced the Confidential Information within five (5) days after receipt of the written notice, counsel for that party shall be authorized to provide access to the information to the designated person.

(d) If the party that produced the Confidential Information objects to access by the designated person this information, the party requested this access and the party producing the information shall attempt to resolve the objection. Either party unable to resolve the objection may apply to the Commission for a ruling on the access issue. Access to the information shall not be given to the designated person, pending resolution by the Commission.

(e) The standard to be applied by the Commission in determining a question of expert access to Confidential Information shall be whether access by the individual would be reasonably likely to jeopardize the confidential nature of the information sought. A party dissatisfied with a decision of the Commission may appeal to the District Court, and the information shall not be disclosed to the designated person, pending appeal.

3. Nondisclosure Agreement. Before giving access to Confidential Information to any counsel or expert pursuant to ¶ 2, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to the counsel or expert, who shall agree in writing to comply with and be bound by this Order before disclosure. Confidential Information shall not be disclosed to any person who has not signed a nondisclosure agreement form incorporated herein as Exhibit "A." Court reporters shall also sign an Exhibit "A." Exhibit "A" requires the persons obtaining disclosure first to read a copy of this Protective Order and certify in writing that they have reviewed the Order and consented to be bound by its terms. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the party

with whom the signatory is associated. The agreement shall be delivered to counsel for Mountain Water and a copy delivered to the Commission.

4. Delivery of Documentation. Where feasible, Confidential Information will be marked as such and delivered to counsel. The Confidential Information may also be made available for review by counsel and experts accorded access in a place and a time mutually agreed on by the parties, or as directed by the Commission.

5. Challenge to Confidentiality. This Order establishes a procedure to expedite handling of information that a party claims is confidential; it shall not be construed as an agreement or ruling on the confidentiality of any such document. A party to the proceeding or other interested person or entity with proper standing, or the Commission on its one motion, may challenge the providing party's claim of confidentiality at any time. Any such petition or motion must be served on the providing party, and the providing party may file a response or objection within 14 days thereafter. The providing party's response may also request a hearing or oral argument before the Commission, including its grounds for such request.

(a) If the parties are unable to agree that certain documents, data, information, studies or other matters constitute private, trade secret, confidential or privileged commercial and financial information, the party objecting to the proprietary claim shall request the Commission's review pursuant to this Order. Upon determining whether any documents, data, information, studies or other submitted matters are Confidential Information, the Commission will enter an order resolving the issue.

(b) Any party, appropriate person or entity (as described above) may file a request for removal of Confidential Information from the protective requirements of this Order or from the sealed record, to be placed in the public record. If the confidential or proprietary nature of this information is challenged, a hearing examiner and/or the Commission shall resolve the issue following proceedings in camera conducted with only persons present with authorized access to such confidential matter. The record of in camera hearings shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER, DOCKET NO. D95.9.128" and transcribed only upon agreement of the parties or Order of the Hearing Examiner or the Commission. If transcribed, the record shall be separately bound, segregated, sealed, and withheld from inspection by any

person not authorized disclosure under this Order. The court reporter shall sign an Exhibit "A." There may be no release from the restrictions of this Order without either an agreement of the parties or an Order of the Hearing Examiner or the Commission, after notice to the parties and a hearing. If the Hearing Examiner or the Commission rules that any information should be removed from the protection of this Order or the sealed record, the parties shall not disclose such information or use it in the public record for seven (7) business days.

6. Use in Pleadings, Briefs, Etc. Where reference to Confidential Information is required in pleadings, briefs, argument or motions, it shall be by citation of title or exhibit number or by some other nonconfidential description. Any further use of or substantive references to Confidential Information shall be placed in a separate section of the pleading or brief and submitted to the Commission under seal. This sealed section shall be served only on counsel of record (one copy each), who have signed an Exhibit "A."

All the protections afforded in this Order apply to materials prepared and distributed under this paragraph. The requesting and the providing parties shall make a good faith effort to reach an agreement on how to use the information so as not to reveal its trade secret, confidential or proprietary nature. If such efforts fail, the providing party shall identify, within five (5) business days, which portions to place in the sealed record of the documents containing Confidential Information to be offered or referred to on the record. Only one (1) copy may be made of designated documents to be placed in the sealed record and only for that purpose. Otherwise, parties shall make only general references to Confidential Information in these proceedings.

7. Seal. While in the custody of the Commission, materials subject to this Order shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER, DOCKET NO. D95.9.128." Due to the trade secret nature, these materials shall not be considered as records in the possession or retained by the Commission within the meaning of the open meetings or public records statutes.

8. In camera Hearing. Any Confidential Information requiring oral disclosure to be placed in the sealed record in this proceeding shall be offered in an in camera hearing, attended only by persons authorized access to the Information under this Order. Cross-examination on

and substantive reference to Confidential Information and the portion of the record containing the references shall be marked and treated as provided in this Order.

9. Appeal. Sealed portions of the record in this proceeding may be forwarded on appeal to any court of competent jurisdiction in accordance with applicable rules and regulations, but under seal as designated herein for the information and use of the Court.

(e) Return. Unless otherwise ordered, Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, subject to the protective requirements of this Order, and shall be returned to counsel for Mountain Water within 30 days after final settlement or conclusion of this matter, including administrative or judicial review.

10. (a) Use in Decisions and Orders. When practicable, the Commission will refer to Confidential Information in only a general form and will avoid reproduction in any decision of Confidential Information to the greatest possible extent. If it is necessary in this proceeding to discuss Confidential Information in greater detail, the discussion with this protected information shall be placed in a separate section of the Order or Decision under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed an Exhibit "A." Counsel for other parties will receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission after signing an Exhibit "A."

(b) Summary for Record. When filing material with the Commission pursuant to this order which it considers to be Proprietary Information, Mountain Water shall at the same time file a brief non-proprietary written summary of the Confidential Information to be placed in the public record. If the Commission further deems it necessary, Mountain Water shall prepare a written summary of the Confidential Information referred to in a decision or order to be placed on the public record.

11. Segregation of Files. All Confidential Information filed with the Commission will be sealed by the Commission, segregated and withheld from inspection by any person not bound by the terms of this Order. Confidential Information may be released from the restrictions of this Order by agreement of the parties or, after notice and hearing, pursuant to an Order of the Commission or final order of a Court having jurisdiction. The Consumer Counsel may retain all

written Confidential Information obtained under this order, but shall withhold it from inspection by others, except for Consumer Counsel staff and counsel, unless it is released by the Public Service Commission and/or a final order of a court under this paragraph, subject always to the terms of confidentiality in this Order.

12. Preservation of Confidentiality. All persons receiving access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any purpose other than to prepare for and conduct this proceeding as provided in this Order, and shall take reasonable precautions to keep the Confidential Information secure, pursuant to this Order.

13. Reservation of Rights. The parties affected by the terms of this Protective Order further retain the right to question, challenge and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or cross-examination on the grounds of relevancy or materiality.

14. Nonwaiver of Rights. This Order does not constitute any waiver of the rights of any party in this Docket to contest any assertion or finding of trade secret, confidentiality or privilege, and to appeal such determination of the Commission or such assertion by a party.

15. Amendment or Modification The Commission retains jurisdiction of this matter and may alter or amend these provisions, upon motion by an appropriate party and reasonable notice.

DONE AND DATED this 2nd day of June, 1998 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

EXHIBIT "A"

I have reviewed the foregoing Protective Order in Mountain Water Docket No. D98.5.104 dated June 2, 1998, and agree to be bound by the terms and conditions of such order.

Signature

Typed or Printed Name

Employer or Firm

Business Address

Party

Date